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In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO., APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARATHON PIPELINE CO., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the exercise by bankruptcy judges of the jurisdiction defined in 28 U.S.C. (Supp. III) 1471, as provided by the Bankruptcy Act of 1978, violates Article III of the United States Constitution.

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OPINIONS BELOW

The order (J.S. App. 1a-2a)[1] and memorandum opinion (J.S. App. 3a-26a) of the district court are reported at 12 Bankr. Rep. 946. The opinion of the bankruptcy court (J.S. App. 27a-36a) is reported at 6 Bankr. Rep. 928.

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[1] "J.S. App." refers to the appendix in No. 81-546.

JURISDICTION

The judgment of the district court (J.S. App. 1a-2a) was entered on April 23, 1981. The United States filed a notice of appeal (J.S. App. 37a) on May 19, 1981. On July 13, 1981, Justice Blackmun extended the time for docketing the United States' appeal to and including September 16, 1981 (J.S. App. 38a), and the appeal was docketed on that date. Northern Pipeline Construction Co. filed a notice of appeal on May 20, 1981 (81-150 J.S. App. 13a), and the appeal was docketed on July 17, 1981. Probable jurisdiction in both appeals was noted on November 9, 1981, and the appeals were consolidated (J.A. 18-19). The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at J.S. App. 39a-44a.

STATEMENT

1. In 1970 Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in federal bankruptcy law. The Commission prepared a detailed report on this subject, which included proposed legislation. See H.R. Doc. No. 93-137 (Pt. I), 93d Cong., 1st Sess. (1973) (hereinafter cited as "Commission Report"). This proposed legislation and an alternative bill proposed by the National Conference of Bankruptcy Judges were introduced in the 93d Congress. Both houses held extensive hearings on these bills during the 94th Congress. In addition, the House Judiciary Committee solicited and received the views of several

constitutional scholars concerning certain constitutional questions raised by the bills, including whether the Constitution requires that bankruptcy judges be given life tenure and salary protection. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess., Appendix II, 63-87 (1977).

In the 95th Congress, a new bill was introduced in the House of Representatives that was based on both earlier bills and information received in the Congressional hearings. This bill, with amendments, was ultimately passed by the House as H.R. 8200 and sent to the Senate for its consideration on February 8, 1978. On September 22, 1978, the Senate passed its own bill, S. 2266, which differed in many significant respects from the House bill. No formal conference was held to resolve the differences between the bills. Instead, on September 28, the House passed, as an amendment to the Senate bill, a new version upon which the managers of the bills in both the House and Senate had agreed. See 124 Cong. Rec. 32392 (1978) (statement of Rep. Edwards). On October 5, this version was passed by the Senate with several further amendments, and the House passed the Senate's latest version the following day. 124 Cong. Rec. 34019, 34143-34145 (1978). Thereafter, on November 6, 1978, the President signed into law the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.*—the first comprehensive reform of the federal bankruptcy system since the Chandler Act of 1938.[2]

2. The purpose of the new Bankruptcy Act was a comprehensive "modernization of the bankruptcy

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[2] For a detailed account of the legislative history of the Act, see Klee, *A Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941 (1979).

laws." S. Rep. No. 95-989, 95th Cong., 2d Sess. 2 (1978); H.R. Rep. No. 95-595, *supra*, at 2. To achieve this goal, Congress altered the structure and jurisdiction of the bankruptcy courts. Prior to 1978, federal district courts served as bankruptcy courts (see 11 U.S.C. 1(10)), but proceedings in bankruptcy cases generally were held before bankruptcy referees appointed by the district court, unless the district court elected to withdraw the case from the referee. See Bankruptcy Rule 102.[3] The judgment of the referee was final unless appealed to the district court within 10 days. Bankruptcy Rules 801-803.

Under prior law, the jurisdiction of the bankruptcy courts was defined in 11 U.S.C. 11. Bankruptcy courts were vested with "summary jurisdiction," which extended to controversies involving property in the actual or constructive possession of the court, such as property in the possession of the bankrupt during the proceedings. However, they did not have jurisdiction over "plenary" controveries, including disputes involving property in the possession of a third person, except by consent. See generally 2A *Collier on Bankruptcy* ¶ 38.09[2], at 1428, 1435 (14th ed. 1978); Commission Report, *supra*, at 88-89.

The new Bankruptcy Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U.S.C. (Supp. III) 151(a). Whereas bankruptcy referees previously were appointed for six-year terms by the district court, the judges of

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[3] Since 1973, bankruptcy referees were considered "bankruptcy judges." Bankruptcy Rule 901(7).

the new bankruptcy courts are to be appointed to 14-year terms by the President, with the advice and consent of the Senate, and are subject to removal by the Judicial Council of the circuit for incompetence, misconduct, or disability. 28 U.S.C. (Supp. III) 152 and 153.

The new Act also eliminates the distinction between summary and plenary jurisdiction. It provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11." 28 U.S.C. (Supp. III) 1471(b). It further provides that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. (Supp. III) 1471(c).[4] Thus, subsequent to the filing of a petition pursuant to Title 11, the bankruptcy court may hear a wide variety of cases, including cases requiring trial by jury, that affect the property of the estate. 28 U.S.C. (Supp. III) 1472-1480.[5] The bankruptcy court "shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. (Supp. III) 1481.

The new Act also specifies a procedure for taking appeals from the bankruptcy court. The circuit coun-

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[4] The bankruptcy court and the district court have authority to abstain from adjudicating a particular controversy "in the interest of justice." 28 U.S.C. (Supp. III) 1471(d).

[5] The "property of the estate" is broadly defined by the new Code in 11 U.S.C. (Supp. IV) 541. It may include property in the possession of a third party.

cil is empowered to direct the Chief Judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U.S.C. (Supp. III) 160. These panels have jurisdiction of all appeals from final orders of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. 28 U.S.C. (Supp. III) 1482. If no such appeals panel is designated, the district court is empowered to exercise appellate jurisdiction. 28 U.S.C. (Supp. III) 1334. The court of appeals is given jurisdiction of appeals from the appellate panels or the district court. 28 U.S.C. (Supp. III) 1293(a). If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of the bankruptcy court. 28 U.S.C. (Supp. III) 1293(b).

The Act also prescribes a transition period before the new provisions take full effect. Under Section 402(b) of the Act, 92 Stat. 2682, the provisions relating to the new bankruptcy courts do not formally become effective until April 1, 1984. During the transition period, previously existing bankruptcy courts continue in existence. Section 404(a), 92 Stat. 2683. Incumbent bankruptcy referees, whose terms of office are extended until March 31, 1984, or until their successors take office, are designated to serve as bankruptcy judges in the manner prescribed by the transition provisions. Section 404(b), 92 Stat. 2683.[6] Section 405 of the Act, 92 Stat. 2685, specifies that these bankruptcy judges shall exercise the jurisdiction of the bankruptcy courts in all cases

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[6] During the transition period, bankruptcy judges continue to be subject to removal from office by the district court for incompetency, misconduct, or neglect of duty pursuant to the old Bankruptcy Act (11 U.S.C. 62(b)). See Section 404(d) of the new Act, 92 Stat. 2684.

commenced under Title 11 during the transition period. That jurisdiction is defined in Section 405(b) (92 Stat. 2685) by reference to 28 U.S.C. (Supp. III) 1471, although the latter provision does not formally become effective until 1984. Similarly, the procedure for taking appeals from decisions of bankruptcy judges during the transition period is essentially the same as the procedure described above that will become effective in 1984. Section 405(c), 92 Stat. 2685.

3. On January 14, 1980, Northern Pipeline Construction Company filed a petition for reorganization in the United States Bankruptcy Court for the District of Minnesota. On March 25, 1980, Northern filed in that court (pursuant to 28 U.S.C. (Supp. III) 1471, made applicable by Section 405(b) of the Bankruptcy Act of 1978) the instant adversary proceeding against appellee Marathon Pipeline Company. Northern sought damages arising out of Marathon's alleged "breaches of contract and warranty, misrepresentation, coercion and duress, extra work orders or quantum meruit" (J.S. App. 28a).[7]

Marathon sought dismissal of Northern's complaint, contending that, by vesting the bankruptcy judge with jurisdiction over this plenary proceeding, the Bankruptcy Act of 1978 unconstitutionally confers Article III judicial power on judges who lack life tenure and protection against salary diminution. Because Marathon challenged the constitutionality of a federal statute, the United States intervened. Thereafter, the bankruptcy judge concluded that "the Congressional grant of power and jurisdiction made to

[7] Prior to filing its reorganization petition, Northern had filed suit against Marathon in the United States District Court for the Western District of Kentucky on the same contract claims asserted here. That case is still pending.

the Bankruptcy Court in the Bankruptcy Reform Act of 1978 is proper and constitutional" (*id.* at 32a) and denied the motion to dismiss (*id.* at 27a-36a).[8]

Marathon appealed to the district court. On April 23, 1981, the district court entered an order dismissing Northern's adversary proceeding against Marathon because "the delegation of authority in 28 U.S.C. § 1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges is an unconstitutional delegation of authority" (J.S. App. 1a-2a). After Northern docketed an appeal to this Court, the district court filed a memorandum (J.S. App. 3a-26a) to supplement its order on July 24, 1981. The court stated that "the 1978 Act by eliminating the summary-plenary distinction and bestowing all jurisdiction relating to bankruptcy to the courts of bankruptcy has transferred Article III judicial power to an Article I tribunal" (*id.* at 17a). While it recognized that other Article I courts have exercised "judicial power" in various circumstances (*id.* at 18a-24a), the district court concluded that "necessarily concomitant to the increased powers, jurisdiction and independence of the bankruptcy judges are the life tenure and undiminishable salary guarantees of Article III of the United States Constitution. The creation of a court with such broad jurisdiction and power without the tenure and salary protections of Article III jeopardizes the independence of the entire judiciary" (*id.* at 10a-11a).

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[8] The bankruptcy judge also denied Marathon's motion to dismiss the adversary proceeding, or abstain from rendering a decision, because of the pending action in Kentucky. He further denied Marathon's request for a transfer of the action to the bankruptcy court in Kentucky (J.S. App. 34a-36a).

SUMMARY OF ARGUMENT

I.

A. Although Article III of the Constitution provides that judges of courts constituted thereunder must be accorded life tenure and protection against salary diminution, Congress retains substantial flexibility in determining the forum of decision for cases falling within the judicial power of the United States as defined in Article III. Congress may withhold elements of this jurisdiction from the lower federal courts, leaving those cases to be decided by state courts composed of judges who lack Article III salary and tenure guarantees. In addition, pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends. This Court has upheld the establishment of many such legislative courts, including territorial courts and courts dealing with specialized areas of law such as customs. Thus, it is well established that the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in "specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States*, 411 U.S. 389, 408 (1973).

B. Congress determined that an efficient bankruptcy system requires adjudication by specialized bankruptcy courts exercising plenary jurisdiction. Because of the need for special expertise and expedition in bankruptcy matters, it was clear to Congress that the primary responsibility for bankruptcy cases could not be vested in district judges. Rather, Congress concluded that specialized bankruptcy judges were necessary—a conclusion that the district court bench had implemented as a practical matter under

the prior system by delegating all bankruptcy cases to referees. Moreover, weighty considerations of efficiency pointed toward preserving the Article I status of these judges. This approach prevented an influx of an unusually large number of specialized judges into the Article III judiciary and, more importantly, enabled Congress to retain flexibility to modify the system should the need for specialized judges decline at some future time. Thus, under the *Palmore* standard, Congress plainly had authority to establish Article I courts in the specialized area of bankruptcy.

Congress also determined that an essential feature of bankruptcy reform was the elimination of the previously recognized distinction between "summary" and "plenary" jurisdiction. The difficulty in drawing a clear line between summary and plenary controversies had led in the past to burdensome and wasteful litigation to determine whether the bankruptcy court had jurisdiction of a particular case. Moreover, the existing system had introduced serious delays into bankruptcy proceedings because of the crowded dockets of non-bankruptcy courts. Forcing trustees to litigate claims in various distant forums had subjected estates to significant expenses that sometimes induced trustees to forego litigation to recover assets to which estates were entitled. All of these factors combined to hamper bankruptcy trustees in their efforts to marshal the assets of the estate with reasonable expedition.

Because of the need for a specialized bankruptcy court and the need to have all bankruptcy-related cases consolidated in one court, Congress properly provided that the Article I bankruptcy court may exercise plenary jurisdiction over cases of a type that

could be heard in an Article III court if they were not bankruptcy-related. It is well settled that Congress may rely on the status of a party, such as the bankruptcy trustee, in conferring jurisdiction on a particular tribunal. See, *e.g.*, *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Moreover, the vesting of plenary jurisdiction in the bankruptcy court clearly is appropriate by analogy to principles of pendent jurisdiction. Indeed, this Court previously has recognized the applicability of these principles in the present context. It repeatedly has held that plenary state law suits involving a bankruptcy trustee may be heard in federal court even though, outside the bankruptcy context, there would be no basis for federal court jurisdiction. *Williams* v. *Austrian*, 331 U.S. 642 (1947); *Schumacher* v. *Beeler*, 293 U.S. 367 (1934).

C. The exercise of bankruptcy jurisdiction by bankruptcy courts is analogous to the performance of adjudicatory functions under federal laws by specialized administrative agencies. Because bankruptcy petitions seek a discharge of debts, a benefit that is conferred by the government, they have been recognized to be appropriate for adjudication by an agency. Indeed, many administrative agencies resolve similar cases, and hence the exercise of bankruptcy jurisdiction by an Article I tribunal is consonant with traditional allocations of authority within the federal government.

II.

A. Although the original House bill would have established the bankruptcy courts as independent bodies with full judicial powers, the Senate version that ultimately was enacted into law set up the bankruptcy courts as adjuncts to the district courts with limited powers. By following this approach

and modeling the new bankruptcy system upon the old referee system, Congress sought to remove any doubts as to the constitutionality of the statute. Congress' considered view on the constitutional issue is entitled to substantial deference.

Congress deliberately deleted certain contempt powers and the authority to enjoin other courts, which had been identified as characteristic attributes of judicial power, from the powers of the bankruptcy court. Bankruptcy jurisdiction was vested in the district court, and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Article III court. Thus, viewed within the entire judicial framework set up by Congress, the bankruptcy court is primarily a factfinder, analogous to a special master. All legal questions considered by the bankruptcy court can be determined on appeal by an Article III court. In this context, the arrangement selected by Congress satisfies the requirements of Article III. See *Crowell* v. *Benson*, 285 U.S. 22 (1932).

B. The new bankruptcy system is no different for Article III purposes than the prior system, which operated for many years without constitutional challenge under rules promulgated by this Court. Under the prior system, almost all bankruptcy cases were automatically referred to the bankruptcy judge and were decided by him unless the district court elected to withdraw the case from the referee—a power that almost never was exercised and that was totally beyond the control of the parties. The jurisdiction and powers of the predecessor bankruptcy judges were essentially the same as those of the new bankruptcy courts. The one exception is the extension of mandatory plenary jurisdiction to the new bankruptcy courts. But the predecessor bankruptcy courts adjudicated the same plenary cases by consent of the parties, and this Court

held that such cases properly could be decided by an Article I referee. *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932). Because a defect in subject matter jurisdiction could not have been waived by the parties, the presence of consent in such cases is irrelevant to the Article III analysis. Accordingly, the adjunct system established by the Bankruptcy Act of 1978, just like the predecessor system of adjudication through referees, complies in all respects with the requirements of Article III.

ARGUMENT

THE JURISDICTIONAL SCHEME OF THE BANKRUPTCY REFORM ACT OF 1978 DOES NOT VIOLATE THE CONSTITUTIONAL REQUIREMENTS OF ARTICLE III

After giving full consideration to the relevant constitutional issues, Congress in 1978 reformed the nation's system for adjudicating bankruptcy proceedings. A salient feature of this reform was centralization of jurisdiction over all controversies affecting the property of the bankrupt estate in one court, and Congress specified that the bankruptcy court should exercise that jurisdiction. Although bankruptcy judges are not guaranteed life tenure and protection against salary diminution, two independent grounds support Congress' determination that this jurisdictional scheme comports with the requirements of Article III. First, in order to meet a particularized need in the specialized area of bankruptcy law, Congress is empowered under Article I to establish "legislative courts" to adjudicate bankruptcy-related controversies. Second, even assuming that some of the questions that fall within the jurisdiction exercised by bankruptcy courts must be decided by an Article III

court, the system established by Congress, in which bankruptcy courts exercise limited powers as adjuncts of an Article III court, fully satisfies the requirements of Article III.

I. PURSUANT TO ITS ARTICLE I BANKRUPTCY POWER, CONGRESS IS EMPOWERED TO ESTABLISH LEGISLATIVE COURTS TO ADJUDICATE BANKRUPTCY-RELATED CONTROVERSIES

A. Legislative Courts Constituted Under Article I May Exercise Judicial Power In Areas Requiring Specialized Treatment

1. Article III, Section 1 of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It further provides that the judges of these courts shall serve "during good Behaviour" and that compensation shall not be diminished during their tenure. Article I, Section 8, Clause 9, provides that "Congress shall have Power * * * [t]o constitute Tribunals inferior to the supreme Court." Article III, Section 2 states that this "judicial Power shall extend" to various classes of cases, including those "arising under * * * the Laws of the United States."

Congress retains substantial flexibility within this general framework. It is entirely within Congress' discretion whether to establish any inferior federal courts at all. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 551 (1962) (opinion of Harlan, J.). And, when inferior federal courts are constituted under Article III, Congress need not vest those courts with all of the jurisdiction to which the judicial power of the United States extends. *Cary* v. *Curtis*, 44 U.S. (3

How.) 236, 245 (1845). Indeed, prior to 1875, Congress declined to confer general federal question jurisdiction on the lower federal courts. See generally *Palmore* v. *United States*, 411 U.S. 389, 400-402 (1973).

The corollary of this Congressional power to withhold Article III jurisdiction from the inferior federal courts is that Congress may leave to state courts the decision of cases that fall within the Article III judicial power, even though those state courts are not Article III courts—*i.e.*, courts composed of judges with salary protection and life tenure. Thus, prior to 1875, the general federal question jurisdiction of cases "arising under * * * the laws of the United States" necessarily was exercised by non-Article III state courts. Even today, complaints asserting federally-created rights, with few exceptions, may be heard by state courts (see *Testa* v. *Katt*, 330 U.S. 386 (1947)), and the diversity jurisdiction specified in Article III must be exercised by state courts if the amount in controversy is less than $10,000. See 28 U.S.C. 1332.

Congress' authority to allocate cases falling within the federal judicial power is not limited to a choice between establishing Article III courts to adjudicate federal questions or delegating that task to existing state courts. Since the earliest days of the Republic, this Court has approved the creation by Congress of "legislative courts" pursuant to its Article I powers. In *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828), the Court sustained the creation of non-Article III territorial courts pursuant to Congress' Article I power to make rules respecting the territories of the United States. Subsequently, this Court sustained Congress' exercise of other Article I powers to create a wide variety of specialized Article

I courts. See, *e.g.*, *Palmore* v. *United States*, *supra* (District of Columbia local courts); *Williams* v. *United States*, 289 U.S. 553 (1933) (Court of Claims); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (customs courts);[9] *United States* v. *Coe*, 155 U.S. 76 (1894) (Territorial Court of Private Land Claims); *In re Ross*, 140 U.S. 453, 464-465, 480 (1891) (consular courts); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (military courts).[10] As this Court explained in *Ex parte Bakelite Corp.*, *supra*, 279 U.S. at 449:

> * * * it has long been settled that Article III does not express the full authority of Congress to create courts and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. * * * [T]hose [courts] created by Congress in the exertion of other powers are called legislative courts.

See generally 1 *Moore's Federal Practice* ¶ 0.4, at 61-80 (1981).

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[9] In *Glidden Co.* v. *Zdanok*, *supra*, this Court concluded that, in light of supervening legislation in which Congress declared the Court of Customs and Patent Appeals and the Court of Claims to be established under Article III, the judges of those courts are now "Article III judges" with constitutionally guaranteed salary protection and tenure.

[10] The Tax Court also has been established as an Article I court. See 26 U.S.C. 7441. The constitutionality of the Tax Court has been upheld repeatedly, although the issue has not been presented to this Court. See *Continental Equities, Inc.* v. *Commissioner*, 551 F.2d 74 (5th Cir. 1977); *Hartman* v. *Switzer*, 376 F. Supp. 486, 490 (W.D. Pa. 1974); *Burns, Stix Friedman & Co.* v. *Commissioner*, 57 T.C. 392 (1971).

These courts have been called "legislative courts" because they are created pursuant to Congress' legislative power under Article I. But there is little doubt that such courts may exercise jurisdiction over matters that come within the judicial power of the United States as specified in Article III. See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 396-397 (2d ed. 1973) (hereinafter cited as *"Hart and Wechsler"*); H.R. Rep. No. 95-595, *supra*, at 66-67 (letter of E. Griswold); *id.* at 79-80 (letter of T. Sandalow); *id.* at 83 (letter of D. Shapiro); *id.* at 85-86 (letter of H. Wechsler); Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures*, 88 Harv. L. Rev. 1360, 1462-1463 (1975). In light of the absence of an opinion for the Court in some of the most recent cases concerning Article I courts, those cases do not contain a simple statement of this proposition by a majority of the Court. But an analysis of the opinions in both *Glidden Co.* v. *Zdanok*, *supra*, and *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), reveals that in both cases a majority of the Court apparently agreed on the general proposition that Article III jurisdiction can be conferred on Article I courts. See 2A *Collier on Bankruptcy* ¶¶ 2.01, 2.08 at, 2-15, 2-20 (15th ed. 1980); Broude, *The Referee in Bankruptcy as an Article I Judge: A Reply to Mr. Bondurant*, 46 Am. Bankr. L. J. 39, 46, 51 (1972).

A review of the holdings of this Court strongly supports that conclusion. Thus, it is well established that territorial courts created under Article I may exercise jurisdiction over federal questions that also fall within the jurisdiction of courts created under Ar-

ticle III. See *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 545 n.13 (opinion of Harlan, J.) and cases cited therein. Similarly, while the Court of Claims and Court of Customs and Patent Appeals are now considered Article III courts (see note 9, *supra*), they exercised jurisdiction over questions falling within the federal judicial power even when this Court was of the view that they (or their predecessors) were Article I courts (see *Williams* v. *United States*, *supra*; *Ex parte Bakelite Corp.*, *supra*). By the same token, local courts in the District of Columbia that are created under Article I (see *Palmore* v. *United States*, *supra*) exercise jurisdiction that formerly was exercised by Article III courts (see *O'Donoghue* v. *United States*, 289 U.S. 516 (1933)). Indeed, the fact that this Court exercises appellate jurisdiction to review decisions of legislative courts clearly demonstrates that those courts are capable of rendering judgments in cases raising questions falling within the Article III judicial power. See *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 545 n.13 (opinion of Harlan, J.); *Hart and Wechsler*, *supra*, at 397.[11] Thus, the mere fact that Congress has given bankruptcy courts jurisdiction over cases that fall within the Article III power of federal courts does not mean that bankruptcy courts cannot properly be established under Article I of the Constitution.[12]

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[11] This Court also has recognized that cases pending in an Article I territorial court may be transferred to an Article III court when the territory is admitted to statehood. See *Baker* v. *Morton*, 79 U.S. (12 Wall.) 150, 153 (1870).

[12] Indeed, the bankruptcy jurisdiction is so closely tied to an Article I power that three justices in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, took the position that bankruptcy cases arise only under Article I. See 337 U.S. at 594-599 (opinion of Jackson, J.).

2. The question remains whether Congress' establishment of Article I bankruptcy courts exceeds the limitations on its power to constitute legislative courts. The district court held that it does, explaining (J.S. App. 17a-23a) that Congress' power to establish Article I courts is limited to situations in which Congress legislates for a discrete geographical area over which it has constitutional authority, or in which the jurisdiction of the newly created courts extends only to claims brought against the federal government, such as customs disputes. See also Motion to Affirm 14-16. But there is no constitutional principle that warrants singling out these two situations from others in which Congress also has plenary authority to legislate, or for classifying them as the only ones in which Article I courts may exercise jurisdiction over cases falling within Article III.

Certainly the concern that underlay the tenure and salary protections of Article III—preventing undue governmental pressure on federal judges (see *The Federalist* Nos. 78-79 (A. Hamilton) (J. Cooke ed. 1961))—suggests no basis for such a distinction. The District of Columbia and territorial courts hear the same kinds of cases, involving suits between private litigants, as do Article III inferior federal courts, and litigants in these geographical areas have an equivalent interest in having their disputes resolved by a tribunal that is free from outside pressures.[13] In-

[13] It has been suggested that the "transitory" nature of territorial courts pending statehood supports a special exception for them from the requirements of Article III. *Glidden Co.* v. *Zdanok, supra*, 370 U.S. at 546-547 (opinion of Harlan, J.). But that theory is not an adequate explanation in light of the validity of Article I courts in the District of Columbia (*Palmore* v. *United States, supra*), whose non-state status cannot be said to be transitory. Moreover, territorial courts

deed, the situation in which suits are brought against the United States, as in the Court of Claims, presents the most compelling case of all for taking precautions to insulate a court from potential government pressures, yet it is undisputed that such courts have been recognized as valid Article I courts. Moreover, the district court's suggested restriction on the power of Congress to invest Article I tribunals with Article III jurisdiction takes no account of the numerous specialized administrative agencies, such as the Interstate Commerce Commission, that perform adjudicatory functions under the laws of the United States. See generally pages 33-36, *infra*. Thus, it is apparent that Congress' authority to establish legislative courts in the exercise of its Article I powers is not limited to territorial courts or courts that determine the validity of claims against the government. Nothing in the language of the Constitution or the decisions of this Court suggests such an artificial limitation on Congress' broad powers under Article I.

3. Prior to 1973, the state of the law concerning Congress' authority to establish Article I courts was somewhat confused because of the inability of a majority of the Justices to agree upon an opinion for the court in *Glidden Co.* v. *Zdanok*, *supra*, and *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, and because there were instances in which the same court performing the same functions had been recognized as an Article I court at one time and

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are recognized as proper Article I courts without regard for the likelihood that the territories may soon be admitted to statehood. See, *e.g.*, C.Z. Code tit. 3, § 141 (1963); 37 Stat. 565 (district court for the Canal Zone District set up since 1912 as legislative court with judges who serve fixed terms).

as an Article III court at a later time (see note 9, *supra*). In *Palmore* v. *United States*, *supra*, however, eight members of the Court joined in an opinion that established additional standards for delineating Congress' power to create Article I courts. The Court there upheld Congress' decision to vest in Article I courts exclusive jurisdiction of both criminal and civil cases arising under District of Columbia laws. While recognizing the importance of the tenure and salary protections of Article III, the *Palmore* Court noted that it was by now well established that "practical considerations" support Congress' creation of specialized Article I courts to achieve important legislative objectives (411 U.S. at 404). Specifically, the Court stated that the protections prescribed in Article III "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." Id. at 408.[14] In light of the crisis in the District of Columbia court system that Congress faced, the Court concluded that the need "to relieve the regular Art. III courts * * * from the smothering responsibility for the great mass of [local District of Columbia]

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[14] The district court suggested (J.S. App. 22a-23a) that this Court's reference in *Palmore* to "specialized areas" limits Congress' power to create Article I courts to discrete geographical areas. That interpretation, however, cannot be squared with the fact that the *Palmore* formulation covered courts such as the Court of Claims, the Customs Court, and military courts—courts which are not specialized in a geographical sense. Significantly, the majority of constitutional scholars who addressed this point in response to Congress' solicitation of their views did not accept the interpretation that *Palmore* was so limited. See H.R. Rep. No. 95-595, *supra*, at 66-67, 78, 80, 82, 86 (letters of E. Griswold, T. Sandalow, P. Mishkin, D. Shapiro, and H. Wechsler).

litigation" justified the creation of a new Article I court. *Id.* at 408-409.

Thus, while *Palmore* does not necessarily define the limits of Congress' power to establish legislative courts, it makes clear that, at a minimum, Congress may establish such courts in furtherance of a specific Article I power when there is a particularized need for a specialized court. Of course, this formulation does not necessarily mean that Article III places no constraints on Congress' power to create inferior federal courts.[15] First, *Palmore* authorizes the creation of legislative courts only pursuant to a specific Article I power. Thus, for example, it provides no basis for an Article I court to exercise the federal diversity jurisdiction that is specified in Article III but has no counterpart in Article I. Second, the power to create specialized Article I courts does not mean that Congress can replace the independent Article III inferior federal judiciary by a wholesale assignment of federal judicial business to legislative

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[15] We note, however, that this Court has never invalidated on Article III grounds an Act of Congress establishing a non-Article III tribunal to adjudicate legal claims. And there is room to doubt whether Article III imposes *any* additional restraints on Congress' power in this regard that are not contained in other provisions of the Constitution. Justice Brandeis has observed:

> If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Crowell v. *Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). See also *Hart and Wechsler, supra*, at 396.

courts. See *Hart and Wechsler, supra*, at 396. Cf. *O'Donoghue* v. *United States, supra*, 289 U.S. at 530-531. Finally, even pursuant to an Article I power, Congress can establish a specialized Article I court to exercise Article III jurisdiction only when there is a particularized need for distinctive treatment of the matters assigned to that court, as found in *Palmore*.

The precise limits of congressional power in the first two situations described above need not be explored here. There can be no serious claim that the establishment of bankruptcy courts by the Bankruptcy Act of 1978 is an attempt to supersede the system of lower federal courts that exercise Article III jurisdiction. Moreover, there is no doubt that the Act is an exercise of Congress' power under Article I, Section 8, Clause 4, of the Constitution to enact "[l]aws on the subject of Bankruptcies." See, *e.g.*, *United States* v. *Kras*, 409 U.S. 434, 447 (1973).[16] Hence, under the *Palmore* rationale, the establishment of these courts as Article I courts does not violate Article III if there is a particularized need for distinctive treatment.

B. Congress Correctly Found That There Existed A Particularized Need For A Specialized Bankruptcy Court Exercising Plenary Jurisdiction

1. *An Efficient Bankruptcy System Requires Adjudication By Specialized Judges*

In analyzing the need for reform of the Nation's bankruptcy system, Congress noted that "the most

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[16] Article I broadly authorizes Congress to enact laws on the subject of bankruptcies and to adopt any related legislation that is "necessary and proper" to achieve its objectives. See Article I, Section 8, Clause 18.

severe problem in the bankruptcy administration was the court system." H.R. Rep. No. 95-595, *supra*, at 4. See also Commission Report, *supra*, at 4-7. Because of the dramatic increase in the number of bankruptcy petitions filed in recent years, the "great stresses and strains" on the existing bankruptcy court system created a judicial crisis analogous to that which Congress and the Court confronted in *Palmore*. See 124 Cong. Rec. 28258 (1978) (statement of Sen. DeConcini).[17] As a major element of the reform of this court system, Congress determined that it was necessary to create a new bankruptcy court with increased independence from the district court, which could efficiently resolve the myriad legal controversies that encumber and protract federal bankruptcy proceedings. This concept received almost universal support from those who advised Congress on the need for new bankruptcy legislation. H.R. Rep. No. 95-595, *supra*, at 18. See also S. Rep. No. 95-989, *supra*, at 15-16; Commission Report, *supra*, at 85-96.

Congress fully realized that the bankruptcy system would be threatened with collapse if the primary judicial responsibilities for bankruptcy proceedings were vested in the existing district courts. Because the district courts already were overburdened by their caseload—the criminal portion of which would have to be given precedence over bankruptcy matters because of the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*—Congress recognized that bankruptcy matters would not receive the "expeditious disposition" they require if they were handled by

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[17] The number of bankruptcy cases filed annually increased steadily from 10,000 to over 254,000 between 1945 and 1975. H.R. Rep. No. 95-595, *supra*, at 21.

the district courts. H.R. Rep. No. 95-595, *supra*, at 14. Indeed, in light of the testimony before the Commission concerning district court judges' "lack of interest in bankruptcy matters," Congress feared that bankruptcy cases would be placed at the bottom of district court calendars. *Id.* at 14 & n.88. Moreover, Congress found that the bankruptcy area had "become too specialized and require[d] too much expertise to be able to be handled on an ad hoc basis by a generalist" (*id.* at 9); "a generalist judge that only occasionally handled bankruptcy cases would not have a sufficient understanding of the law and the fact situations that arise * * * [to be able] to make the quick decisions that these cases so often require." *Id.* at 15. Thus, it was clear to Congress that the new statute would have to provide that bankruptcy cases be handled primarily by a specialized group of judges—a conclusion that already had been reached by the district court bench under the prior system of bankruptcy administration, which, as a practical matter, left all bankruptcy matters to the predecessor bankruptcy judges and referees. See *id.* at 9.

Congress also determined that considerations of efficiency required continued recognition of bankruptcy judges as Article I judges with fixed terms of service. Cf. *Palmore* v. *United States*, *supra*, 411 U.S. at 408-409. Congress found that dislocations associated with the evolution of the existing referee system into a body of Article I judges operating as a more independent adjunct of the district court would be minimal as compared to those that would occur if a separate, Article III bankruptcy system were constituted. S. Rep. No. 95-989, *supra*, at 16. The unusually large number of bankruptcy judges to be established under the Act would certainly have caused imbalances in the federal judiciary if their

status had been converted to that of Article III judges. Indeed, the size of the bankruptcy judiciary dwarfs that of other specialized courts, like the Court of Claims, that Congress previously has decided to establish as Article III courts.[18]

Moreover, and particularly because of this large number of judges, it was important for Congress to vest responsibility for bankruptcy matters in judges without life tenure in order to retain sufficient flexibility to modify the system should the need for these highly specialized bankruptcy judges diminish at some future time, either because of legislative changes or altered economic conditions. See H.R. Rep. No. 95-595, *supra*, at 83 (letter of D. Shapiro). Cf. *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 546-547 (opinion of Harlan, J.) (transitory nature of courts recognized as reason for making them legislative courts).[19] If bankruptcy judges were given life tenure and the need for such judges sharply declined at some future time, either the judges would be forced to sit idle or Congress would have to reassign them outside their specialty to another Article III court—results that would be impractical and wasteful. Finally, the establishment of bankruptcy judges as Article I judges was supported by the long tradition of adjudication of bankruptcy matters by referees. As Congress noted, referees serving fixed terms

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[18] At the time Congress was considering the Bankruptcy Act, there were 190 full-time and 30 part-time bankruptcy judges serving in office. H.R. Rep. No. 95-595, *supra*, at 9.

[19] Congress noted that in the past, there have been periods of downward fluctuation in the number of bankruptcies (H.R. Rep. No. 95-595, *supra*, at 21). Of course, it was impossible to predict with accuracy how the 1978 legislation would affect the number of filings.

have long functioned as "a de facto specialized court system within the district courts." H.R. Rep. No. 95-595, *supra*, at 9. In these circumstances, there can be little doubt that, under the *Palmore* standard, Congress had ample authority to establish the bankruptcy courts as Article I tribunals.[20]

2. *An Essential Element of an Efficient Bankruptcy System is the Vesting of Plenary Jurisdiction in the Bankruptcy Court*

a. The legislative record shows almost universal agreement that elimination of the distinction between summary and plenary jurisdiction is an essential feature of bankruptcy reform. The House Report noted that both the Commission Report and numerous witnesses who testified at the House Hearings had argued in favor of eliminating this jurisdictional distinction, and the Report concluded that such a change was "essential to a healthy bankruptcy system." H.R. Rep. No. 95-595, *supra*, at 48. The Senate Report characterized this change as "[a] major impetus" underlying the reform legislation "in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction, a wasteful remnant of the referee system left over from the pre-

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[20] Indeed, even Mr. Plumb, who believed that some aspects of the Commission's proposed bankruptcy legislation could violate Article III, and whose views prompted the House to solicit the opinions of constitutional scholars on the subject (see H.R. Rep. No. 95-595, *supra*, at 64), concluded that "the matters constituting 'proceedings in bankruptcy'" that previously had been delegated to referees undoubtedly could be assigned to legislative courts. Plumb, *The Tax Recommendations of the Commission*, *supra*, 88 Harv. L. Rev. at 1464.

Chandler Act era." S. Rep. No. 95-989, *supra*, at 17. Accordingly, the Bankruptcy Act of 1978 provides that, in conjunction with performing their primary responsibility to adjudicate the underlying bankruptcy petition, the bankruptcy courts may exercise jurisdiction over "all civil proceedings * * * arising in or related to cases under title 11." 28 U.S.C. (Supp. III) 1471(b). Thus, Congress gave the bankruptcy courts jurisdiction over all cases affecting the property of the estate, *i.e.*, the debtor's assets or liabilities, even though these cases sometimes could involve other than pure bankruptcy controversies.[21]

The Commission Report explained in detail why the existing division of jurisdiction between bankruptcy courts and non-bankruptcy courts was unworkable (Commission Report, *supra*, at 88-92), and this analysis was adopted by Congress and reprinted in full in the House Report. H.R. Rep. No. 95-595, *supra*, at 43-48. First, the Commission noted that the division of jurisdiction inevitably introduced delay into the bankruptcy process because "the dockets

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[21] Adjudication of plenary suits could be expected to represent a minor portion of the bankruptcy court's business. The number of individual bankruptcies exceeds the number of business bankruptcies by a ratio of more than 12 to 1. D. Stanley & M. Girth, *Bankruptcy, Problem-Process-Reform* 2 (The Brookings Institution, 1971). These individual proceedings are generally less complex than business bankruptcies and less likely to involve a significant number of plenary suits that would be brought within the bankruptcy court's jurisdiction by Section 1471(c). The House Committee stated that "few cases" would be added to the bankruptcy court's load by this expansion of jurisdiction, noting the Judicial Conference's estimate that it would be less than 600 cases annually. *Report on Hearings on the Court Administrative Structure for Bankruptcy Courts of the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. (Comm. Print No. 13, 1978).

of the non-bankruptcy courts are likely to be more crowded and commencement of the trials more likely to be postponed in such courts than in bankruptcy courts." *Id.* at 45. This Court has long recognized the importance of minimizing delay in bankruptcy proceedings, noting that "a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966), quoting *Ex parte Christy*, 44 U.S. (3 How.) 292, 312 (1845). As the Commission explained, such delay is intolerable "because of the prejudicial effect it might have on prospects for rehabilitating an enterprise in financial distress and the aggravated risk of deterioration of the estate in the course of liquidation." H.R. Rep. No. 95-595, *supra*, at 45 (footnote omitted).

Second, the Commission pointed to the significant additional expenses incurred by the estate of the debtor when it is forced to litigate in distant forums outside the bankruptcy court. The Commission found that in the past "trustees have often foregone litigation to recover assets of estates because of the potential expense and other difficulties of litigating in distant courts, having limited resources with which to wage such litigation." H.R. Rep. No. 95-595, *supra*, at 45. See also *Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 145 (1975) (testimony of Bankruptcy Judge Copenhaver).

The Commission found the most serious problem with the division of jurisdiction to be "the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding." H.R. Rep. No. 95-595

supra, at 45. The source of this burdensome litigation is the practical difficulty in drawing a clear line between summary and plenary jurisdiction; the distinction has been called "one of the most involved and controversial questions in the entire field of bankruptcy." See H.R. Rep. No. 95-595, *supra*, at 45, quoting MacLachlan, *Bankruptcy* § 24 (1956). In the words of the Senate Report, "the jurisdictional limitations presently imposed on the bankruptcy courts have embroiled the court and the parties in voluminous litigation whose sole function is to determine whether the court possesses the requisite summary jurisdiction to determine the merits of issues often necessarily heard by the court in determining its jurisdictional question." S. Rep. No. 95-989, *supra*, at 17.

The Commission concluded that each of these factors operated to hamper the trustee in marshalling the assets of the estate:

> Generally, time is on the side of the defendant. If he can subject the plaintiff trustee to the necessity of suing in another court, he can gain the additional time which that necessity imposes on the trustee. Similarly, the extra expense entailed by the estate when the trustee is forced to sue elsewhere gives his adversary a counter for bargaining with him. Even when the trustee is likely to prevail in a contest over whether the bankruptcy court has jurisdiction, the adversary by merely litigating the issue of jurisdiction may gain most of the advantages he would get if he won on the jurisdictional issue, *viz.*, time and bargaining leverage against the trustee. Thus, the adversary has a strong incentive to press his jurisdictional objections to the bankruptcy court's jurisdiction up through the appellate courts.

H.R. Rep. No. 95-595, *supra*, at 46. In view of these findings, Congress had a rational basis for determining that there was a strong need to invest the specialized bankruptcy courts with plenary bankruptcy jurisdiction.

b. Of course, it is quite true that, by virtue of 28 U.S.C. (Supp. III) 1471(c), some cases will be heard in bankruptcy courts even though the same cases would be heard in an Article III court if a bankrupt estate were not one of the parties. This result, however, presents no difficulty under Article III. It is quite common in our judicial system for a tribunal to exercise jurisdiction over a case based on the identity of one of the parties to the dispute. See, *e.g.*, 28 U.S.C. 1442(a)(1); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 475 n.5 (1957) (Frankfurter, J., dissenting); *Maryland* v. *Soper*, 270 U.S. 9, 32 (1926); *Pacific Railroad Removal Cases*, 115 U.S. 1, 11-14 (1885); *Tennessee* v. *Davis*, 100 U.S. 257, 260-266 (1879). *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 193 (1953).

Moreover, the exercise of plenary jurisdiction by bankruptcy courts is analytically similar to an exercise of pendent jurisdiction. Just as a federal court constitutionally may exercise jurisdiction over a state law claim because of its relationship to a federal claim within the federal question jurisdiction of the court (*United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966)), so a specialized bankruptcy court may exercise jurisdiction over a non-bankruptcy case involving the property of the estate because resolution of that case is closely intertwined with the ultimate resolution of the pending bankruptcy proceeding. See H.R. Rep. No. 95-595, *supra*, at 81 (letter of T. Sandalow). See

also *Rosado* v. *Wyman*, 397 U.S. 397, 402-405 (1970); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 380-381 (1959).

Of particular relevance here is the fact that a federal bankruptcy court may assume jurisdiction of a plenary suit brought under state law by a trustee in bankruptcy. The Bankruptcy Act of 1898 divested the bankruptcy courts of jurisdiction over plenary suits brought by the trustee, but it permitted the court to continue to hear such suits by consent (see page 44, *infra*). In *Schumacher* v. *Beeler*, 293 U.S. 367 (1934), this Court held that the exercise of jurisdiction by the federal courts over such suits was constitutional. The Court stated: "The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts shall have jurisdiction." *Id.* at 374. See also *Williams* v. *Austrian*, 331 U.S. 642 (1947); *Lathrop* v. *Drake*, 91 U.S. 516, 518 (1875). Thus, this Court has recognized that the connection between plenary suits and the underlying bankruptcy proceeding is sufficiently strong to provide a basis for federal bankruptcy court jurisdiction over plenary suits that, outside the bankruptcy context, would be heard in state court. See generally *Textile Workers Union* v. *Lincoln Mills*, *supra*, 353 U.S. at 483 (Frankfurter, J., dissenting). In light of Congress' recent determination that considerations of fairness and efficiency demand that summary and plenary suits be heard in the same court, there is a compelling reason for applying the principle of *Schumacher* here and permitting an Article I bankruptcy court to exercise jurisdiction over a plenary suit that, outside the bankruptcy context, would be heard in an Article III court. See generally, P. Bator,

P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 90-91 (2d ed. Supp. 1977).[22]

C. Bankruptcy Courts Exercise Power Analogous To The Adjudicatory Power Exercised By Certain Administrative Agencies

For many years, numerous executive and independent administrative agencies have performed adjudicatory functions in the exercise of their specialized statutory responsibilities. Indeed, the Administrative Procedure Act contains a special section devoted to adjudicative procedures. 5 U.S.C. 554. Because these agencies adjudicate matters that arise under federal laws—for example, deportation proceedings conducted by the Immigration and Naturalization Service as a delegate of the Attorney General (see 8 U.S.C. 1251-1254)—many of them perform functions that Congress could have chosen to commit to Article III courts. Congress' decision to vest bankruptcy jurisdiction in legislative courts is analogous to its conferral of adjudicative functions on these agencies.

To be sure, matters adjudicated by agencies often relate to "public rights" created by a particular statute and generally involve the government taking a position as a representative of the public. Cf. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442, 455 (1977). Bankruptcy proceedings primarily concern the relationship

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[22] To the extent that the new Bankruptcy Act gives the bankruptcy courts jurisdiction over plenary suits that would otherwise be heard in *state* court (see *Schumacher* v. *Beeler*, *supra*) any Article III objection is insubstantial because the suits would in any event be heard in a non-Article III court.

between an insolvent debtor and his creditors. See *Wright* v. *Union Central Life Insurance Co.*, 304 U.S. 502, 513-514 (1938); *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 667-675 (1935). But bankruptcy proceedings involve the conferral of a public benefit and implicate the public interest in a way that ordinary suits between private litigants do not. This Court has noted that the bankruptcy statute "is something more than another mode of transferring property *in invitum*. It is a gift of privileges and expresses the conditions upon which they are conferred." *Page* v. *Edmunds*, 187 U.S. 596, 605 (1903). Moreover, "[t]he determination of the *status* of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern." *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192 (1902).

The discharge in bankruptcy of a debtor's obligations is unquestionably a benefit conferred by the government. Just as non-Article III administrative agencies constitutionally may grant government benefits such as radio station licenses, pilot licenses, or certificates for common carriers, an administrative agency could be established to adjudicate bankruptcy petitions and grant discharges. Indeed, a recent study recommended that bankruptcy cases be delegated to an administrative agency (see D. Stanley & M. Girth, *Bankruptcy, Problem-Process-Reform* 4, 196-218 (The Brookings Institution, 1971)), and this Court has stated that there would be no constitutional bar to that course of action. *United States* v. *Kras*, *supra*, 409 U.S. at 447. See also Commission Report, *supra*, at 85, 98 n.9 (noting remarks of Chief Justice Warren).

Plenary suits, of course, involve disputes between private parties, but the fact that Congress deemed it necessary to have those disputes resolved in bankruptcy courts does not weaken the comparison to the work of administrative agencies. In carrying out their public responsibilities, agencies frequently resolve disputes between private parties. The Federal Communications Commission, for example, may resolve disputes between private parties as to who is entitled to a license to operate a radio station and on what frequency. See, *e.g.*, *FCC* v. *National Broadcasting Co.*, 319 U.S. 239 (1943); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940).[23] Likewise, the Department of Labor adjudicates disputes between private parties regarding federal workers' compensation claims. See 33 U.S.C. (& Supp. III) 919 and 921. In *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932), this Court specifically recognized that such claims involve "private right[s], that is, of the liability of one individual to another." Nonetheless, the Court concluded that the merits of such claims could be adjudicated by an administrative agency subject to judicial review, "thus relieving the courts of a most serious burden." *Id.* at 54. See also *Voehl* v. *Indemnity Insurance Co.*, 288 U.S. 162 (1933).[24]

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[23] The Copyright Royalty Tribunal (CRT) is a modern tribunal with substantial parallels to the bankruptcy court. Pursuant to 17 U.S.C. (& Supp. III) 115 and 116, users of certain copyright materials are required to pay a licensing fee, and the CRT distributes those fees to competing copyright owners. Thus, much like a bankruptcy court, the CRT is responsible for the marshalling and distribution of assets among competing private claimants.

[24] Of course, there may be some plenary suits that could not be heard before an agency, such as those in which the

Most significantly, this Court has specifically recognized that Congress may vest bankruptcy powers in non-tenured administrative agencies or officials. The Court has rejected an Article III challenge to the delegation by Congress of certain bankruptcy authority affecting the rights of debtors and creditors in railroad reorganizations. *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943). See also *Ecker* v. *Western Pacific R.R.*, 318 U.S. 448 (1943). The Court also has held that the Comptroller of the Currency may, consistent with the Constitution, exercise his statutory role in the collection and distribution of the assets of an insolvent national bank (see 12 U.S.C 192-197). *In re Chetwood*, 165 U.S. 443, 457-458 (1897); *Bushnell* v. *Leland*, 164 U.S. 684 (1897). In sum, Congress' decision that bankruptcy jurisdiction be exercised by a non-tenured legislative court does not mark a sharp departure from other delegations of authority to government bodies created under Article I that adjudicate cases affecting the rights of private parties.

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litigants have a Seventh Amendment right to a jury trial. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission, supra.* But if the bulk of the cases in the bankruptcy court are cases that would appropriately be decided by an agency, it makes perfect sense to allow the Article I tribunal to hear all plenary suits, as long as the Seventh Amendment right is protected. See H.R. Rep. No. 95-595, *supra*, at 83 (letter of D. Shapiro).

II. BY VESTING BANKRUPTCY JURISDICTION IN THE DISTRICT COURTS AND PROVIDING FOR THE EXERCISE OF THAT JURISDICTION IN THE FIRST INSTANCE BY AN ADJUNCT TRIBUNAL WITH LIMITED POWERS, CONGRESS SATISFIED ANY CONSTITUTIONAL REQUIREMENT THAT BANKRUPTCY QUESTIONS BE DECIDED BY ARTICLE III COURTS

A. The district court concluded that the Bankruptcy Act of 1978 is unconstitutional because it "transferred Article III judicial power to an Article I tribunal"—the bankruptcy court (J.S. App. 17a). Even assuming arguendo that the Constitution requires that bankruptcy questions be determined by an Article III court, the district court reached the wrong result here because it isolated the bankruptcy court from the total judicial framework constructed by Congress. In fact, using the existing referee system as its model, Congress carefully subordinated bankruptcy courts to Article III tribunals in order to remove any possible constitutional objection.

The bill originally reported by the House Judiciary Committee would have established the bankruptcy courts as independent bodies with full judicial powers. The Committee recognized the option of establishing them as Article I courts, but for policy reasons (H.R. Rep. No. 95-595, *supra*, at 22-23), and to avoid constitutional questions (*id.* at 23-39), the bill as reported designated the bankruptcy judges as Article III judges. The House was divided on this issue, and initially the House bill was amended on the floor to retain the bankruptcy courts as Article I adjuncts to the district court. 123 Cong. Rec. 35692-35693 (1977). Ultimately, however, the House rejected this amendment and passed the bill in a form that conferred Article III status on the bankruptcy judges.

In contrast, the bill passed by the Senate limited the powers of the bankruptcy courts and established them as Article I adjuncts to the district court. See S. Rep. No. 95-989, *supra*, at 153-154. The House then accepted those changes in the compromise agreed to by the House and Senate managers.[25]

Thus, the Bankruptcy Act of 1978 did not establish completely independent bankruptcy courts as contemplated by the House bill. Instead, it created tribunals subject to the special limitations introduced by the Senate. The Act specifies that the new bankruptcy courts are "adjuncts" to the district court. 28 U.S.C. (Supp. III) 151. Both during and after the transition period, jurisdiction in bankruptcy cases and related civil actions is vested directly in the district courts, although exercise of that jurisdiction at the trial level has been delegated by statute to bankruptcy judges. 28 U.S.C. (Supp. III) 1471; Pub. L. No. 95-598, Section 405(a), 92 Stat. 2685. The Act also differs from the House bill in that it limits the contempt power of the bankruptcy judges and prohibits them from enjoining proceedings in other courts. 28 U.S.C. (Supp. III) 1481; Pub. L. No. 95-598, Section 405(a)(1), 92 Stat. 2685. This limitation was a direct response to the comments on the House bill by the Judicial Conference and several constitutional scholars that identified the conferral of these powers on the bankruptcy courts as raising constitutional problems not implicated by the mere estab-

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[25] In its amendment of the Senate version, the House changed the bankruptcy courts to adjuncts of the court of appeals (see 124 Cong. Rec. 32391 (1978) (statement of Rep. Butler)), but the Senate reinstated them as adjuncts of the district court (see 124 Cong. Rec. 34019 (1978) (statement of Sen. Thurmond)) in the final series of amendments to which the House agreed.

lishment of Article I courts to hear plenary bankruptcy cases. See Judicial Conference of the United States, *Second Preliminary Report of the Ad Hoc Committee on Bankruptcy Legislation* 10 (June 7, 1977); H.R. Rep. No. 95-595, *supra*, at 81, 84 (letters of T. Sandalow and D. Shapiro); see also *id.* at 86, 87 (letters of H. Wechsler and C. Wright).

In short, by eliminating some of the proposed changes from the old system in order to reduce the independence of the new bankruptcy courts, Congress intended to remove any constitutional objections to the new Bankruptcy Act. See S. Rep. No. 95-989, *supra*, at 16.[26] Congress complied with the literal

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[26] Congress' considered judgment that the Bankruptcy Act of 1978 satisfies Article III is entitled to substantial deference. To be sure, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But it is also true that an act of Congress is presumptively constitutional and that that presumption is particularly strong where Congress has analyzed the constitutionality of a proposed statute in considerable detail. See, *e.g.*, *Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981), slip op. 6; *Fullilove* v. *Klutznick*, 448 U.S. 448, 472-473 (1980) (opinion of Burger, C.J.); *Palmore* v. *United States*, *supra*, 411 U.S. at 409; *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964). See also *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 541-543 (opinion of Harlan, J.). Here, after consultation with various authorities and extended debate, Congress selected the present court structure. Both Attorney General Bell, on behalf of the Department of Justice, and Judge Aldisert, on behalf of the federal Judicial Conference, testified that they believed the Senate bill to be constitutional. *Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 412-414, 544 (1977). In addition, the Commission on Bankruptcy Laws had reported to Congress that bankruptcy jurisdiction could be exercised by a non-Article III judge. See Commission Report, *supra*, at 91-92.

requirements of Article III by vesting jurisdiction of bankruptcy matters in the district court. And by constituting the bankruptcy courts as adjuncts with limited powers, Congress essentially set up a system that makes the bankruptcy judges the primary fact-finders but leaves the determination of the law in the hands of Article III judges.

In *Crowell* v. *Benson*, *supra*, this Court made clear that the requirements of Article III may be satisfied by a procedure in which an Article I tribunal acts as a factfinder subject to review by an Article III court. While recognizing that Article III defines the judicial power of the United States, the Court explained that "the extent of the power as well as the mode of proceeding * * * are subject to the regulation of Congress." 285 U.S. at 53. Specifically, "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.* at 51. Accordingly, the Court found that a non-Article III agency could make factual determinations under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* By the same token, this Court customarily exercises its original jurisdiction by appointing special masters who need not be Article III judges, and the Court "regularly acts on the basis of the master's report and exceptions thereto." *United States* v. *Raddatz*, 447 U.S. 667, 683 n.11 (1980).

Here, both the findings of fact and conclusions of law of the adjunct bankruptcy court are reviewable as of right by an Article III court and, in some cases, by both the district court and the court of appeals. See 28 U.S.C. (Supp. III) 1293 and 1334; Pub. L. No. 95-598, Section 405(c), 92 Stat. 2685. The stat-

ute prescribes no particular standard of review. Presumably, the same standard would apply as under Bankruptcy Rule 810—findings of fact made by a bankruptcy judge must be accepted unless clearly erroneous. See Pub. L. No. 95-598, Section 405(d), 92 Stat. 2685. At least in a civil case, Article III clearly does not require a de novo standard of review. Cf. *United States* v. *Raddatz*, *supra*, 447 U.S. at 681-682. In *Crowell*, the Court recognized that deference would be given to the deputy commissioner's findings of fact, noting that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." 285 U.S. at 54. Indeed, the Court's opinion suggested that, at least in civil cases, Article III is satisfied if appellate review by an Article III tribunal is available. *Id.* at 48-54. See also *United States* v. *Raddatz*, *supra*, 447 U.S. at 681-684; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, *supra*, 430 U.S. at 455 n.13; *Swain* v. *Pressley*, 430 U.S. 372, 382 n.16 (1977); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936).

B. Whether or not a right of appeal to an Article III tribunal always is sufficient to satisfy the requirements of Article III, it is clear that the particular adjunct system set up by Congress here does satisfy those requirements. That is so because the new Bankruptcy Act was modeled on the old referee system that had operated for many years without constitutional challenge under rules promulgated by this Court.[27] Of course, the Bankruptcy Act of 1978 made

[27] 28 U.S.C. 2075 provides the authority for promulgation of bankruptcy rules by this Court and specifies that, once those rules have taken effect, "[a]ll laws in conflict with such rules shall be of no further force or effect."

important changes that enlarged the jurisdiction of the bankruptcy courts and increased their independence, such as the provision for lengthy terms of service for bankruptcy judges with appointment by the President rather than by the district court. But for purposes of analysis under Article III, no material changes were made.

Under the old bankruptcy statute, the district courts were designated as the courts of bankruptcy (11 U.S.C. 1(10) and 11(a)), which had jurisdiction, *inter alia*, to "[a]djudge persons bankrupt * * *; [a]llow claims, disallow claims * * *; * * * [and] [c]ause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto * * *." 11 U.S.C. 11(a). The statute, however, also created the office of referee (11 U.S.C. 61-67), and the referee, later renamed "bankruptcy judge" (Bankruptcy Rule 901(7)), was included by statute within the definition of the bankruptcy court (11 U.S.C. 1(9)), because he exercised much of the judicial authority of that court. See *White* v. *Schloerb*, 178 U.S. 542 (1900). Section 22 of the old statute, 11 U.S.C. 45, and Bankruptcy Rule 102(a) required automatic reference of all bankruptcy cases (with limited exceptions) to bankruptcy judges, and "[t]hereafter all proceedings in the case [were to] be before the referee," with certain specified exceptions. Section 38 of the old Act, 11 U.S.C. 66, vested referees with jurisdiction to "make the adjudications or dismiss the petitions" referred to them; to "determine the dischargeability of debts, and render judgment thereon;" and to "perform such of the duties as are by this title conferred on courts of bankruptcies * * *." See generally 2A *Collier on Bankruptcy* ¶ 38, at 1391-1447 (14th ed. 1978).

Moreover, as under the 1978 Act, the district court retained power to enjoin other courts (11 U.S.C. 11(a)(15)) and to punish for contempt (11 U.S.C. 11(a)(16) and 69(b)) that was withheld from referees.

Thus, with the exception of the district court's power to withdraw a reference from the bankruptcy judge and act upon it itself (Bankruptcy Rule 102(b))—a power that was exercised only infrequently—the relationship between the district court and the bankruptcy court was no different under the old statute than it is under the new Bankruptcy Act. Moreover, the district court's power under prior law to withdraw a reference could not be invoked by the parties; it was solely within the discretion of the district court. Thus, for the vast majority of cases that automatically were referred to a non-tenured referee and never were withdrawn, the Article III analysis is the same under the old statute as under the new Act.

Pursuant to the broad powers described above, referees under the old Act heard the same bankruptcy matters that, if not referred to them, would have been heard by an Article III court and that now will be heard by the new bankruptcy judges. Moreover, the old referees decided "summary" disputes between the debtor and private parties involving a variety of factual and legal matters that, outside the bankruptcy context, would be appropriate for determination by an Article III judge. See, *e.g.*, *Katchen* v. *Landy*, *supra*; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U.S. 426, 430-431 (1924); *Weidhorn* v. *Levy*, 253 U.S. 268, 271-272 (1920); *White* v. *Schloerb*, *supra*. "In short, wherever the bankruptcy court [could] act summarily respecting persons or property, the referee, upon gen-

eral reference, [could] do likewise unless specifically restricted by the Act or Bankruptcy Rules." 2A *Collier on Bankruptcy* ¶ 38.09, at 1432 (14th ed. 1978).[28] Of course, the referee's jurisdiction, like the bankruptcy court's jurisdiction, was limited to "summary" cases where the court had at least constructive possession of the property in dispute. But that fact is irrelevant to the Article III analysis. If Article III prohibited a bankruptcy referee from exercising jurisdiction over a particular suit, it is not apparent why that prohibition would disappear simply because the property involved was in the constructive possession of the court.

The significant jurisdictional change made by the Bankruptcy Act of 1978 was the vesting of plenary jurisdiction in the bankruptcy court. But this change did not mark an unprecedented departure from past practice. The jurisdictional grants under the Bankruptcy Acts of 1841 and 1867 were almost as extensive, permitting the bankruptcy court to hear matters related to bankruptcy proceedings even if there was no other basis for federal jurisdiction. See, *e.g.*, *Lathrop* v. *Drake*, *supra*; see generally Commission Report, *supra*, at 91-92, 100. And even after mandatory plenary jurisdiction was removed from the bankruptcy courts in 1898, plenary suits could still be heard in the bankruptcy courts with the consent of the parties. See 11 U.S.C. 11(a)(7); Bankruptcy Rule 915(a); *Schumacher* v. *Beeler*, *supra*, 293 U.S. at 374.

Significantly, this Court has recognized that a bankruptcy referee can hear and decide such plenary suits with the consent of the parties. *MacDonald* v.

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[28] Indeed, the referee was empowered in appropriate circumstances to conduct jury trials. See Bankruptcy Rules 115(b)(1) and 409(c).